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Lorillard Tobacco Company,	)	
a Delaware corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 03 C 4986
	)	
S & M Central Service Corporation,	)	Judge Holderman
an Illinois corporation,	)	
	)	
Defendant.	)	
	)	

## JURY INSTRUCTIONS

Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex. The parties to this case and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law that I give you, and reach a just verdict regardless of the consequences.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. It is not my function to determine the facts in this case. That function belongs to you.

You should consider and decide this case as an action between persons of equal standing in the community and holding the same or similar stations in life. Each party is entitled to the same fair consideration. A corporation is entitled to the same fair consideration as a private individual. All persons and corporations stand equal before the law and are to be dealt with as equals in a court of justice.

As I stated earlier, it is your duty to determine the facts. In determining the facts, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses, testimony that was read to you from depositions, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true or that a person would have given certain testimony.

Certain things are not evidence. I will list them for you.

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, television, or Internet reports that you may have seen or heard. Such reports are not evidence, and your verdict must not be influenced in any way by such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements and arguments to you are not evidence. The purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what the lawyers said, your memory is what counts.

Some of you may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, in other words it is proof of one or more facts that point to the existence or non-existence of another fact. You are to consider both direct and circumstantial evidence. The law allows you to give equal weight to both types of evidence, but it is up to you to decide how much weight to give to any evidence in the case.

You are to consider all of the evidence in determining your verdict. However, that does not mean that you must accept all of the evidence as true or accurate.

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life.

In our lives, we sometimes look at one fact and conclude from that fact that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences. Any inferences that you make must be reasonable and must be based on the evidence in the case.

In determining the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. You will also have to decide what weight, if any, to give to the testimony of each witness.

In considering the testimony of any witness, you may take into account:

- the opportunity and ability of the witness to see or hear or know the things that the witness testified about;
- the witness's age;
- the witness's memory;
- the witness's intelligence;
- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;
- the witness's manner while testifying;
- the reasonableness of the witness's testimony in light of all the evidence in the case; and
- any other factors that bear on believability.

The weight of the evidence as to a particular fact does not necessarily depend on the number of witnesses who testify. You may find the testimony of a smaller number of witnesses to be more persuasive than that of a greater number.



A witness may be discredited or “impeached” by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness’s testimony.

If you believe that any witness has been impeached, then you must determine whether to believe the witness’s testimony in whole, in part, or not at all, and how much weight to give to that testimony.

It is proper for an attorney to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney does not, by itself, reflect negatively on the truth of the witness's testimony.

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

In a civil lawsuit like this one, the burden is on the plaintiff to prove every essential element of its claim by a “preponderance of the evidence.”

A preponderance of the evidence simply means evidence that persuades you that the plaintiff’s claim is more likely true than not true.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof establishes each essential element of the plaintiff’s claim by a preponderance of the evidence, then you should find for the plaintiff as to that claim.

If the proof fails to establish any essential element of the plaintiff’s claim by a preponderance of the evidence, then you should find for the defendant as to that claim.

A trademark is any word, name, symbol, or device, or any combination thereof used by any person to identify and distinguish his or her goods, including a unique product, from those manufactured and sold by others and to indicate the source of the goods, even if that source is unknown. Trademark rights include the right to exclude others from using that trademark.

Registration of a trademark with the United States Patent and Trademark Office is evidence that a trademark is valid and enforceable.

A counterfeit mark is a false mark which is identical to, or substantially indistinguishable from, a registered trademark.

Defendant S & M has conceded that it offered for sale cigarettes bearing counterfeit versions of Lorillard's trademarks. Therefore, to prevail on its claim, Lorillard must prove by a preponderance of the evidence that consumers would be likely to confuse the cigarette packs bearing the counterfeit marks with genuine Newport cigarette packs.

If you find that Lorillard has proven this, your verdict should be for the plaintiff.

To determine whether a defendant's use of a trademark causes confusion, you must consider the following factors. The presence or absence of any particular factors should not necessarily resolve whether there was a likelihood of confusion. Rather, the likelihood of confusion test is an equitable balancing test. You must consider all relevant evidence in determining this. As you consider the likelihood of confusion, you should examine each of the following:

1. Similarity between the marks in appearance and suggestion. If the overall impression created by the plaintiff's trademark in the marketplace is similar to that created by the defendant in appearance, sound and/or meaning, there is a greater chance of likelihood of confusion.

2. Similarity of the products. The more similar the products, the greater the likelihood of confusion.

3. Whether the marks were used in the same area and manner. If the defendant and plaintiff use their trademarks on the same, related, or complementary kinds of goods, there may be a greater likelihood of confusion about the source of the goods than otherwise. If the plaintiff's and defendant's goods or products are likely to be sold in the same or similar stores or outlets, or advertised in similar media, this may increase the likelihood of confusion.

4. The degree of care likely to be exercised by consumers. The more sophisticated the potential buyers of the goods or the more costly the goods, the more careful and discriminating the reasonably prudent purchaser exercising ordinary caution may be. They may be less likely to be confused by similarities in the plaintiff's and defendant's trademarks.

5. Strength of the plaintiff's mark. The more the consuming public recognizes the plaintiff's trademarks as an indication of origin of the plaintiff's goods, the more likely it is that consumers would be confused about the source of the defendant's goods if the defendant uses similar marks.

6. Whether actual confusion exists. If use by the defendant of the plaintiff's trademarks has led to instances of actual confusion, this suggests a likelihood of confusion.

7. Whether the defendant intended to "pass off" his product as that of the plaintiff. The defendant's intentional use of the plaintiff's trademarks to identify similar goods suggests an intent to cause a likelihood of confusion.

If you find that consumers would not be likely to confuse the cigarette packs bearing the counterfeit marks with genuine Newport cigarette packs, your verdict is in favor of S & M.

If you find that consumers would be likely to confuse the cigarette packs bearing the counterfeit marks with genuine Newport cigarette packs, your verdict is in favor of Lorillard.

A verdict form has been prepared for you to report your findings and verdict. Please follow the instructions and answer the questions on the verdict form. Your answers must be unanimous.



If your findings are in favor of Lorillard, you must consider the question of whether S & M's actions were taken willfully or with willful blindness.

Infringing conduct is willful where the defendant knows that its conduct constitutes infringement or where it shows reckless disregard of the trademark owner's rights. Lorillard has the burden of proving S & M's willfulness by a preponderance of the evidence. Willfulness may be proven by showing that the defendant was willfully blind. A defendant is willfully blind if it suspects wrongdoing and deliberately fails to investigate or fails to inquire further because it is afraid of what the inquiry would yield. Willful blindness may be inferred from the facts and circumstances of the case.

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

As I stated, a verdict form has been prepared for you.

This form will be brought to you in the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the form, and each of you will sign it.

During the trial, some of you from time to time may have made notes. If you did make notes, please remember in using the notes during your deliberations that the notes are not evidence. Your notes are merely an aid to you in remembering the evidence. Also, you should not be unduly influenced by the notes of other jurors. A juror's notes are not entitled to any weight if the notes are inconsistent with the collective recollections of the members of the jury as to the evidence in the case. You as the jury should rely on your collective recollections of the evidence in reaching your verdict in this case.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer. I will photocopy your communication, give it to counsel, and allow counsel to meet with me here in open court, as required by the law, before I respond to your communication.

If any communication is made, it should not indicate your numerical division.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the views of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or solely for the purpose of returning a unanimous verdict.

All of you should give fair consideration to all the evidence and deliberate with the goal of reaching a verdict which is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to determine the truth from the evidence in the case.